THE EFFECT OF WAR ON CONTRACTS.

What effect does the outbreak of war between nations have upon contracts between citizens of such nations? Here is a question which merchants and manufacturers in most of the commercial centers of the world have been asking their legal advisers since the summer of 1914. It is also a question which will be asked many times in the future, and especially after the war, for with the return of peace the courts of the belligerent nations will be opened to litigants who are now barred from such courts as alien enemies.[1] It may be safely predicted that a majority of the numerous cases which will arise out of problems created by the war, will involve commercial contracts entered into by residents of the United States and residents of Germany or Austria.

A casual search through digests and the reading of case headnotes may leave the searcher with the vague impression that the outbreak of war has some peculiar effect upon contracts, not to be accounted for by any of the well established principles of contract law. Thus, it is frequently said that war suspends contracts and that the cessation of war revives the same.[2] On the other hand, it is stated elsewhere in no less positive terms that war dissolves and abrogates all contracts between subjects of belligerent nations.[3] An attempt will here be made to show that cases arising upon contracts affected by war may in fact be classified by an application of the broad principles of the common law relating to contracts.

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[1]It is well settled that alien enemies, resident in the enemy country, may not sue in our courts during the war. Brandon *v.* Nesbitt (1794) 6 Durn. & E. 23; Porter *v.* Freudenberg [1915] 1 K. B. 857. In Dorsey *v.* Thompson (1872) 37 Md. 25, two theories are suggested as a basis for this rule: (1) that there is a possible benefit to be derived by the enemy from allowing such a plaintiff to recover, and (2) that there is no right in such plaintiff to use the courts, by reason of his status as an alien enemy. Trading with the Enemy Act (Act of Oct. 6, 1917) § 7b by implication recognizes this rule. But if the alien enemy resides in this country, this disability does not exist. Clarke *v.* Morey (N. Y. 1813) 10 Johns. 69; Schaffenius *v.* Goldberg [1916] 1 K. B. 284.

[2]Prize Cases (1862) 67 U. S. 635, at p. 687; Semmes *v.* City Fire Ins. Co. (1869) 21 Fed. Cas. No. 12,651; Brown *v.* Hiatts (1872) 82 U. S. 177; Statham *v.* New York Life Ins. Co. (1871) 45 Miss. 581; Haymond *v.* Camden (1883) 22 W. Va. 180; O'Reily *v.* Mutual Life Ins. Co. (N. Y., 1866) 2 Abb. Pr. (N. S.) 167; Jackson Ins. Co. *v.* Stewart (1866) 13 Fed. Cas. No. 7,152; Janson *v.* Driefontein Consol. Mines, Ltd. [1902] A. C. 484.

[3]Brown *v.* Delano (1815) 12 Mass. 370; M'Grath & Jones *v.* Isaacs (S. C. 1819) 1 Nott & McCord 562; Hanger *v.* Abbott (1868) 73 U. S. 532.

I.

Contracts made between subjects of belligerent nations after the outbreak of war are usually declared void.[4] "War, when duly declared or recognized as such by the war making power, imports a prohibition to subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country,"[5] unless such intercourse is permitted by express license from the sovereign.[6] This is universally declared to be a principle of "public law,"[7] sanctioned by international custom and usage. The belligerent governments, however, upon the outbreak of war, are usually prompt in giving detailed expression to this rule of international law in the form of "non-intercourse acts,"[8] or "trading with the enemy acts."[9] All commercial intercourse between peoples at war being thus forbidden, contracts entered into subsequent to the war, without express license, are usually

[4]Willison *v.* Patteson (1817) 7 Taunt. 439; Buchanan *v.* Curry (N. Y. 1821) 19 Johns. 137; Mutual Benefit Life Ins. Co. *v.* Hillyard (1874) 37 N. J. L. 444; Scholefield *v.* Eichelberger (1833) 32 U. S. 586; Hanger *v.* Abbott, *supra,* footnote 3; Haggard *v.* Conkwright (1869) 70 Ky. 16; Haymond *v.* Camden, *supra,* footnote 2; Billgerry *v.* Brand (1869) 60 Va. 393; Musson *v.* Fales (1820) 16 Mass *332; Griswold *v.* Waddington (N. Y. 1819) 16 Johns. *438; White *v.* Burnley (1857) 61 U. S. 235; The Prize Cases, *supra,* footnote 2; Russ *v.* Mitchell (1864) 11 Fla. 80; Jackson Ins. Co. *v.* Stewart, *supra,* footnote 2; Rice *v.* Shook (1871) 27 Ark. *137; Watts, Watts & Co. *v.* Unione Austriaca di Navigazione (D. C. 1915) 224 Fed. 188; Elgee's Adm'r. *v.* Lovell (1865) 8 Fed. Cas. No. 4,344.

[5]Hanger *v.* Abbott, *supra,* footnote 3, at p. 535. *Accord,* the Wm. Bagaley (1866) 12 U. S. 377, at p. 405; The Prize Cases, *supra,* footnote 2, at p. 687; Insurance Co. *v.* Davis (1877) 95 U. S. 425, at p. 432; Kershaw *v.* Kelsey (1868) 100 Mass. 561; Walker *v.* Beauchler (1876) 68 Va. 511; Haymond *v.* Camden, *supra,* footnote 2; Small *v.* Lumpkin (1877) 69 Va. 832; Harden *v.* Boyce (N. Y. 1870) 59 Barb. 425; The Hoop (1799) 1 C. Rob. 196; Potts *v.* Bell (1800) 8 Durn. & E. 548, at p. 561; The Panariellos (1915) 84 L. J. P. 140; Horlock *v.* Beal [1916] 1 A. C. 486; Robson *v.* Premier Oil Co. [1915] 2 Ch. 124, at p. 135; Arnhold Karberg & Co. *v.* Blythe, etc. Co. [1915] 2 K. B. 379; 4 Calvo Le Droit International (4th ed.) § 1953, *et seq.*; 2 Halleck International Law (4th ed.) 143, *et seq.*; 1 Trotter, The Law of Contract During War § 9.

[6]United States *v.* Lane (1868) 75 U. S. 185; Scholefield *v.* Eichelberger, *supra,* footnote 4; United States *v.* One Hundred Bbls. Cement (1862) 27 Fed. Cas. No. 15,945.

[7]Stephens *v.* Brown (1884) 24 W. Va. 234; Rice *v.* Shook, *supra,* footnote 4; McKee *v.* United States (1868) 75 U. S. 163; Hanger *v.* Abbott, *supra,* footnote 3; United States *v.* Lane, *supra,* footnote 6; Conrad *v.* Waples (1877) 96 U. S. 279; Haggard *v.* Conkwright, *supra,* footnote 4; Statham *v.* New York Life Ins. Co., *supra,* footnote 2.

[8]*Cf.* 13 Stat. 730-1.

[9]See British Trading with the Enemy Act, September 18, 1914, (Act 4 and 5 Geo. V, c. 87) and United States Trading with the Enemy Act (Act of Oct. 6, 1917.)

in sweeping terms declared void as contrary to public policy.[10] Like all rules grounded on public policy, an absolute rule cannot be safely applied in every instance. In forbidding commercial intercourse with enemy subjects, the nation is particularly concerned that no money, commodities or intelligence pass into the enemy country, to aid and strengthen the opposing forces.[11] Hence it is that the international law ban upon all trading or commercial intercourse with enemy peoples falls not only upon trade or intercourse with subjects and citizens of the enemy residing in the enemy country, but upon trade or intercourse with every resident, or person having a "trade domicile" in enemy territory, regardless of such person's sympathies.[12] And accordingly, so long as there is no actual trafficking across the enemy's frontier and no transaction involving a transfer into enemy territory of money, goods or intelligence, it is probable that the strict rule making void all contracts between belligerents subsequent to the beginning of war, cannot be universally applied, aside from statutory prohibitions. This was the opinion of Justice Gray in the leading case of *Kershaw* v. *Kelsey*,[13] decided in 1868, wherein

[10] *Supra*, footnote 4.

[11] Briggs *v.* United States (1892) 143 U. S. 346, 12 Sup. Ct. 391; Hepburn's Case (Md. 1830) 3 Bland 95; Buchanan *v.* Curry, *supra*, footnote 4; Statham *v.* New York Life Ins. Co., *supra*, footnote 2; Watts, Watts & Co. *v.* Unione Austriaca di Navigazione, *supra*, footnote 4; Porter *v.* Freudenberg, *supra*, footnote 1, at p. 868; Dicey, Conflict of Laws (2nd ed.) 737; *cf.* § 4a United States Trading with the Enemy Act.

[12] Small *v.* Lumpkin, *supra*, footnote 5; The Pizarro (1817) 15 U. S. 227, at p. 246; Esposito *v.* Bowden (1857) 7 El. & Bl. 763; Porter *v.* Freudenberg, *supra*, footnote 1; M'Connell *v.* Hector (1802) 3 B. & P. 113; Janson *v.* Driefontein Consol. Mines Ltd., *supra*, footnote 2, at p. 505; Ingle, Ltd. *v.* Mannheim Ins. Co. [1915] 1 K. B. 227; 2 Westlake, International Law 140; 2 Oppenheim, International Law (2nd ed.) §§ 88, 90.

[13] *Supra*, footnote 5.

The following is taken from the opinion in this case at pp. 572, 573:

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes * * * any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the textbooks are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed

it was held, after an elaborate review of American, English and continental authorities, that a lease of a cotton plantation in Mississippi, executed in February, 1864, between a resident of Mississippi, and a resident of Massachusetts, the latter sojourning for the time being in Mississippi, was valid, since this contract involved no dealings back and forth across the line between the belligerent nations, and contained no agreement for the shipment of cotton or other commodities across the line. To say, then, as high authority has said, that subsequent to a declaration of war

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to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

This decision has received the express approval of the United States Supreme Court, (Mr. Justice Field in Briggs *v.* United States, *supra,* footnote 11, and Williams *v.* Paine (1897) 169 U. S. 55, 18 Sup. Ct. 279), but has been criticized in a recent English case, Robson *v.* Premier Oil Co., *supra,* footnote 5. In this case it was held that an alien enemy holding shares in a British corporation, might not vote such shares during the war. It was urged that the prohibition of intercourse between subjects of belligerent nations extended only to commercial intercourse, and counsel cited Kershaw *v.* Kelsey to support this contention. The court, however, remarks:

"This case has been followed in other cases in America. As we have already said, no such limitation is to be found suggested in any English case, and we cannot agree with it. The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.

"The learned judge, Gray, J., in *Kershaw* v. *Kelsey,* states the law in our opinion correctly when he says the law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries, but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse.

"We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or advantage to the enemy; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden."

Similar to Kershaw *v.* Kelsey is Haggard *v.* Conkwright, *supra,* footnote 4, in which the facts were as follows: In September, 1861, H, in Kentucky drew and delivered to C in Kentucky (a loyal state) an order addressed to E in Texas (a rebel state) requesting him to pay money in his hands belonging to H to T, who was in Texas. This order was transmitted through the lines and executed. *Held,* that this transaction was valid. *Cf.* Antoine *v.* Morshead (1815) 6 Taunt. 237. *Contra,* Billgerry *v.* Brand, *supra,* footnote 4.

In Briggs *v.* United States, *supra,* footnote 11, a resident of Kentucky sold and delivered to another resident of Kentucky all the cotton on his plantations in Mississippi. This sale purported to include all cotton which the vendor had or might have during the year 1862. The cotton was seized by Union forces. The vendee, after the war, brought suit in the Court of Claims under the Abandoned Property Act to recover the proceeds of the cotton thus seized. *Held,* that the vendee might recover.

between nations the citizens of the one nation have "no capacity to contract" with the citizens of the other,[14] is not to indicate accurately the reasons why such contracts are usually held void.[15]

Since the passage on October 6, 1917 of the Trading with the Enemy Act, discussion of the right of citizens of the United States to contract with citizens or subjects of enemy countries or the allies of enemy countries, requires a study of such act. It may be stated broadly, that it is now unlawful under this act for any person or corporation in the United States to "Enter into, carry on, complete, or perform any contract, agreement, or obligation * * *. Pay * * * compromise, or give security for the payment * * * of any debt * * *. Draw, accept, pay, * * * or indorse any negotiable instrument or chose in action * * *. Buy or sell, loan * * * trade in, deal with, exchange, * * * transfer, * * * or receive any form of property," or "have any form of business or commercial communication or intercourse with" (1) individuals or partnerships resident in territory of an enemy nation or the ally of an enemy nation, or with corporations incorporated in such territory, or (2) with individuals or partnerships resident outside the United States, or corporations incorporated outside the United States, which are doing business in such territory, or (3) with enemy governments or allies of the enemy governments, national or municipal, or their officers or agents, or (4) with individuals, other than citizens of the United States, who are natives, citizens, or subjects of an enemy nation or ally of an enemy nation, wherever resident or doing business, whom the President of the United States may by proclamation declare to be "enemies."[16] An exception to this broad prohibition exists where a license has been obtained from the President within a prescribed period.[17]

[14]Mr. Justice Catron in White *v.* Burnley (1857) 61 U. S. 235 and Mr. Justice Johnson in Scholefield *v.* Eichelberger, *supra,* footnote 4.

[15]It was held by Lord Mansfield as early as 1765 that recovery would lie after the war upon a ransom bill executed to an enemy subject during hostilities. Ricord *v.* Bettenham (1765) 3 Burr. 1734.

In Musson *v.* Fales (1820) 16 Mass. 331, the facts were as follows: a United States brig put into Bermuda during the war of 1812, and by means of bogus ship's papers which gave her the appearance of being a Spanish vessel, prevailed upon certain British merchants at Bermuda to make repairs for her and advance certain funds. After the war, these British merchants were allowed to recover for these advances. It must be obvious that if capacity to contract were indeed lacking, these results could never be reached.

[16]§§ 2 and 3. *Cf.* § 7b.

[17]§§ 4a and 5.

II.

Of contracts entered into prior to the war, debts, or so-called executed contracts, are the least difficult of classification. When all active performance required by the terms of a contract has taken place prior to the outbreak of war and nothing remains but an obligation to pay money, resting upon one of the contracting parties, the authorities are uniform in holding that the obligee's right to collect this debt is not cut off by war, but merely suspended for the period of the war.[18] While the courts do not deny that a nation at war has the right to confiscate debts owed by its citizens to the enemy,[19] the exercise of this right, once favored by jurists,[20] would to-day doubtless be universally disapproved[21]—unless perhaps by international lawyers of the "scrap of paper" school. And if the state fails to avoid such debts, the courts universally declare that the debtors themselves may not, upon the return of peace, plead the war as a bar to their obligations. Even with this protection, however, the creditor will be concerned (1) as to the running of the statute of limitations, and (2) as to his right to recover interest for the period of the war. American owners of the bonds of German and Austrian corporations will examine with particular care the authorities on these questions.

[18]Jackson Ins. Co. *v.* Stewart, *supra,* footnote 2; Brown *v.* Hiatts, *supra,* footnote 2; Hanger *v.* Abbott, *supra,* footnote 3; Perkins *v.* Rogers (1871) 35 Ind. 124; Hoare *v.* Allen (1789) 2 U. S. 102; New York Life Ins. Co. *v.* Statham (1876) 93 U. S. 24; Hamersley *v.* Lambert (N. Y. 1817) 2 Johns. Ch. *508; Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra,* footnote 4; Rice *v.* O'Keefe (1871) 53 Tenn. 638; Wall *v.* Robson (S. C. 1820) 2 Nott & McCord 497; Wilcox *v.* Henry (1782) 1 U. S. 69; Brown *v.* United States (1814) 12 U. S. 110; Crutcher *v.* Hord (1868) 67 Ky. 360; Watts, Watts & Co. *v.* Unione Austriaca di Navigazione, *supra,* footnote 4; Rothbarth *v.* Herzfeld (1917) 100 Misc. 470, 166 N. Y. Supp. 744.

[19]Schulz Co. *v.* Raimes & Co. (1917) 100 Misc. 697, 164 N. Y. Supp. 454; Peerce *v.* Carskadon (1870) 4 W. Va. 234.

[20]See Year Book, 19 Edw. IV, pl. 6, holding that an alien's bond was forfeited by war. Hangar *v.* Abbott, *supra,* footnote 3; Jackson Ins. Co. *v.* Stewart, *supra,* footnote 2; Schulz Co. *v.* Raimes & Co., *supra,* footnote 19.

[21]Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra,* footnote 4; Wall *v.* Robson, *supra,* footnote 18; Brown *v.* United States, *supra,* footnote 18; Hanger *v.* Abbott, *supra,* footnote 3; Wolff *v.* Oxholm (1817) 6 M. & S. 92. Treaties have frequently by express terms forbidden sequestration and confiscation of debts. See Treaty between United States and France (1800); Treaty between United States and England (1795). Within recent years the old right of confiscation of debts has been exercised only once, namely, by the Confederate States in 1861. See Act of Confederate Congress of August 30, 1861, entitled "An Act for the Sequestration of the Estates of Alien Enemies," amended, Feb. 15, 1862.

The cases are apparently uniform in holding that the usual period prescribed by the Statute of Limitations is to be enlarged by including within itself the additional period of the war.[22] Contrary to the usual rule relative to disabilities arising subsequent to the maturity of a debt,[23] this rule is applied even in cases where war commences subsequent to the maturity of the debt, the time during which the statute runs being computed by adding the period from the maturity of the debt to the outbreak of war, to the period from the end of the war to the commencement of the suit.[24] The theory of the courts is that since the courts of the debtor's country are closed to the creditor while the war lasts, on the ground that he is an alien enemy, to permit the statute to run against the debt pending such disability would be in substance to confiscate the debt.[25] Cases which permit the statute to run during the war period can usually be distinguished on the ground that in the particular case considered the creditor had free access to the courts of the debtor's domicile during the war.[26]

As to the creditor's right to interest during the war period, the courts favor the debtor to an extent which cannot be approved, either in justice or as consistent with legal theory. The rule, announced and applied without qualification in nearly all the cases on the subject, is that interest upon a debt due from a resident in the enemy country, abates during the period of the war, and upon the return of peace may not be collected for such period.[27]

[22]Perkins *v.* Rogers, *supra,* footnote 18; Hanger *v.* Abbott, *supra,* footnote 3; The Protector (1871) 79 U. S. 700; Brown *v.* Hiatts, *supra,* footnote 2; Caperton *v.* Martin (1870) 4 W. Va. 138; Hoare *v.* Allen, *supra,* footnote 18; Seymour *v.* Bailey (1872) 66 Ill. 288; Mixer *v.* Sibley (1869) 53 Ill. 61; Williams *v.* State (1881) 37 Ark. 463. This rule does not appear to have been altered by the Trading with the Enemy Act. See § 8c.

[23]Act 21 James I, c. 16 § 7; Wood, Limitations (3rd ed.) 526 *et seq.*; 25 Cyc. 1267.

[24]Jackson Ins. Co. *v.* Stewart, *supra,* footnote 2; Wall *v.* Robson, *supra,* footnote 18.

[25]Williams *v.* State, *supra,* footnote 22.

[26]Zacharie *v.* Godfrey (1869) 50 Ill. 186.

[27]Hoare *v.* Allen, *supra,* footnote 18; Brown *v.* Hiatts, *supra,* footnote 2; Jackson Ins. Co. *v.* Stewart, *supra,* footnote 2; Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra,* footnote 4; Shortridge *v.* Macon (1867) 22 Fed. Cas. No. 12,812; Foxcraft *v.* Nagle (1791) 2 U. S. 132; Roberts' Adm'r. *v.* Cocke (1877) 69 Va. 207, 212; McVeigh *v.* Bank of the Old Dominion (1875) 76 Va. 188; Chamberlain *v.* Brown (Md. 1803) 2 Bland's Ch. 221; Dickinson *v.* Legare (S. C. 1797) 1 Desaussure 537; Christie *v.* Hammond (Md. 1795) 2 Bland's Ch. 645n; Davis *v.* Wright (1835) 2 S. C. 560, 568; Blake *v.* Quash (S. C. 1825) 3 McCord *340; M'Call *v.* Turner (1797) 5 Va. *133; Brewer *v.* Hastie & Co. (1801) 7 Va. *22; Tucker *v.* Watson, McGill Co. (Pa. 1867) 6 Am. Law Reg. (N. S.) 220; Bordley *v.* Eden (Md. 1793) 3 Harris & McHenry 167; Bigler *v.* Waller (1870) 3 Fed. Cas. No. 1,404.

The reasoning of the courts appears to be that since payment of the principal of the debt is unlawful during the war, the debtor must not be taxed for retaining such principal. Thus it is said in a leading case upon the point,[28]

> "Interest is paid for the *use* or *forbearance* of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendant pay him, consistent with law; * * *. Where a person is prevented by law, from paying the principal, he shall not be compelled to pay interest during the prohibition, * * *."

So it has been frequently held that where the creditor has an agent residing during the war in the same country with the debtor, interest may be recovered for the war period.[29] Under the present Trading with the Enemy Act, providing[30] for an "alien property custodian," who is "empowered to receive all money and property in the United States due or belonging to an alien enemy, or ally of enemy," it would seem that an enemy creditor would always during the present war have an agent, resident in the United States, in the person of this official, authorized to accept payment, and that interest would not therefore abate during the war on such a debt.

Only two exceptions to this strict rule seem to have been suggested by the courts, and neither of these adopted or approved. In *Shortridge* v. *Macon,*[31] decided in 1867, the court announced the doctrine that a Confederate debtor could not, as against a Northern creditor, assert that interest abated in his favor during the period of the Civil War, since to permit him to claim such an abatement on the ground that he could not have paid the principal of the debt during the war period would be to permit him to take advantage of his own wrong in adhering to the forces of secession. Although this rule of special privilege to Northern

[28]Hoare *v.* Allen, *supra,* footnote 18. Practically the same language is used by the court in Brown *v.* Hiatts, *supra,* footnote 2.

[29]Ward *v.* Smith (1868) 74 U. S. 447; Denniston *v.* Imbrie (1818) 7 Fed. Cas. No. 3,802; Thomas *v.* Hunter (1868) 29 Md. 406; Yeaton *v.* Berney (1871) 62 Ill. 61; Kent, Paine & Co. *v.* Chapman (1881) 18 W. Va. 485, 501; Crenshaw *v.* Seigfried (1874) 65 Va. 272; Johnston *v.* Wilson (1877) 70 Va. 379; Hawkins' Ex'rs. *v.* Minor (1804) 9 Va. 118; Paul *v.* Christie (Md. 1798) 4 Harris & McHenry 161; Conn *v.* Penn (1818) 6 Fed. Cas. No. 3,104.

[30]§ 6.

[31]*Supra,* footnote 27.

creditors was approved in two subsequent decisions,[32] a doubt as to its correctness was intimated in the case of *Bigler* v. *Waller*[33] by the same Federal judge who wrote the opinion in *Shortridge* v. *Macon,* and it must doubtless be attributed to the influence of the strong partisan feeling current at that period. The theory which is its only support is at variance with decisions of the United States Supreme Court holding that citizens of the Confederate States were entitled to all the right and privileges accorded to subjects of an enemy nation by international law.[34]

The other exception to the rule suspending interest is suggested in *Lash* v. *Lambert,*[35] where the court attempts to distinguish between interest expressly provided for by the terms of the contract, and interest allowed by law in cases where the contract makes no provision for interest. It is there said that interest expressly stipulated for in the contract must be paid during war time. The Supreme Court of the United States, however, in the case of *Brown* v. *Hiatts,*[36] expressly refused to adopt this distinction and reaffirmed the strict rule.

A writer in the Law Quarterly Review[37] seems to have taken accurate exception to the rule suspending interest during war, on the ground that a distinction should be made between cases where the debt matures before the war, and cases where it matures during or after the war; that in the former, interest may reasonably be suspended during the war period, but that in the latter cases, since the debtor has no right, war or no war, to pay the debt before maturity without the creditor's consent, interest should be charged against the debtor until the debt falls due. From an examination of American decisions, however, it is believed that the learned

[32]Spencer *v.* Brower (1870) 32 Tex. 663; Lash *v.* Lambert (1870) 15 Minn. 416.

[33]*Supra,* footnote 27.

[34]Mrs. Alexander's Cotton (1864) 69 U. S. 404; The Prize Cases, *supra,* footnote 2.

[35]*Supra,* footnote 32.

[36]*Supra,* footnote 2, at pp. 185-186. The language of the court is as follows:

"The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those in which the law allows interest, and contends that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war."

[37]Robert Agar Chadwick, "Foreign Investments in Time of War" (1904) 20 Law Quarterly Rev. 167.

writer would have greater difficulty, than he appears to anticipate, in reconciling this entirely reasonable and just theory with prevailing judicial opinion.[38] The only affirmative authority which has been found to support his argument (a case which he himself does not cite) is the language of the court in *Lash* v. *Lambert*, *supra*.[39]

III.

Executory contracts entered into prior to the outbreak of war may be affected in either of two ways: (1) performance on the one side or the other may be rendered impossible, or (2) performance on the one side or the other may be rendered illegal. It is believed that, with this distinction in mind, the English and American cases may be classified and a general definition of what the law is on this subject attempted. Cases dealing with contracts between subjects of neutral nations, and between subjects of neutral nations and belligerent nations, will be considered in discussing this problem, since they illustrate the principles involved.

Before proceeding to analyze the cases, it is important to note here—as well as in the case of executed contracts already considered—that since by hypothesis the contracts we are dealing with are between residents in different countries, the lawyer's first duty is to determine the law of the country which shall govern the controversy and say whether or not the contracting party in default has been excused. For instance, suppose a contract to have been entered into between a German and an Englishman in London in June, 1914, and that the Englishman by such contract assigned to the German certain patent rights, and the German agreed to exploit these patent rights in Russia and pay royalties to the Englishman therefor. Suppose that after the war the Englishman sues the German in a French court for the latter's failure to perform this contract. What law will be applied by the French court which hears this case? The law usually applied in such a situation is the law of the place where the contract was made, and the leading case supporting such theory is *Jacobs* v. *Credit Lyonnais*.[40] By a contract made in London, the defendant

[38] *Cf.* Brown *v.* Hiatts, *supra*, footnote 2. In this case the debt fell due after the outbreak of the Civil War and the contract stipulated that interest should be paid at 20% per annum. Nevertheless it was held that interest abated for the period of the war. See also, Bigler *v.* Waller, *supra*, footnote 27.

[39] *Supra*, footnote 32.

[40] (1884) 12 Q. B. D. 589.

agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on steamers to be provided by the plaintiffs. Only a part of the esparto was delivered, and when suit was brought to recover damages for the non-delivery of the remainder, the defendant pleaded that an insurrection in Algeria and the resulting military operations made performance impossible; that the law of Algeria (French) should govern; that such law excused non-performance on the ground of impossibility. The English court held, however, that English law—the law of the place where the contract was made—must govern its decision and that as English law did not recognize mere impossibility as an excuse for non-performance, the judgment for the plaintiff must be affirmed. The court appears to proceed upon the theory that the law applicable in such a case as this must be the law the parties to the contract intended should apply to their agreement, and that the "broad rule is, that the law of a country where a contract is made governs, as to the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties."[41] In other words, unless from the situation of the parties or a professed "construction" of the contract the court can say that the parties intended to be governed by some other law, the court will presume that the law of the place of making was intended to govern the performance of the contract.[42] This is the theory applied by the English courts, not only in determining the law which is to judge of the efficacy of an excuse for non-performance, but also in determining what law shall say whether or not a valid contract has in fact arisen.[43] It may be

[41]At p. 600.

[42]A recent case in New York applies the same rule. In Richards & Co. *v.* Wreschner (Sup. Ct. 1915) 156 N. Y. Supp. 1054, a German co-partnership in New York City agreed in January, 1914, to sell to the plaintiff in Boston 120 tons of antimony of a kind manufactured nowhere else than at a certain factory in Belgium, delivery to be at the rate of 15 tons per month, February to September, 1914. The written contract itself was executed in New York City. Beginning July 31, 1914, all exportations of antimony from Belgium were forbidden by Germany. The plaintiff sued for non-delivery of the antimony subsequent to that date. The plaintiff was allowed recovery on the ground that the contract having been made in New York, its nature, validity, obligation, and legal effect must be governed by New York law (the *lex loci contractus*) and that by New York law it was well settled that impossibility due to a foreign war did not excuse non-performance.

[43]*Dictum* of Lord Mansfield in Robinson *v.* Bland (1760) 2 Burr. 1077; *In re* Missouri S. S. Co. (1889) 42 Ch. D. 321; *cf.* Liverpool Steam Co. *v.* Phenix Ins. Co. (1889) 129 U. S. 397, 9 Sup. Ct. 469; Morgan *v.* New Orleans, *etc.* R. R. (1876) 17 Fed. Cas. No. 9,804.

remarked, incidentally, that the English courts have been loath to discover an intention on the part of the contracting parties that English law shall not govern.

Like most rules of the conflict of laws, or so-called private international law, this rule laid down in *Jacobs* v. *Credit Lyonnais,* itself capable of being applied differently by different courts, is probably by no means universally acknowledged. No attempt will be made here to enter into a discussion of whether or not the law of the place of performance should not be the law to govern in these matters,[44] rather than the law intended by the parties (presumably the law of the place of contracting) as decided in the Jacobs case, nor to criticize the rule in the Jacobs case. It is merely desired to point out that this preliminary problem should be kept in mind in dealing with these contracts of an international aspect, especially since in many of the cases this point is not noticed at all, the courts assuming without discussion that the law of the forum is to be applied.

Assuming then, that by the rules of the conflict of laws English or American law may properly be applied in a given case in deciding whether or not a contracting party in default is to be excused, we may proceed to inquire what rules have been established by the English and American cases.

That war has made the performance of an executory contract impossible in fact, is not, without more, generally regarded by English and American courts as an excuse for non-performance. The common law rule is applied here, as in numerous cases where impossibility arises out of facts other than a state of war, that simple impossibility of performing a contract never excuses the promisor from his liability.[45] Several cases growing out of the interruption of commerce upon the outbreak of war are to be accounted for on this ground. In *Furness, Withy & Co.* v. *Muller & Co.,*[46] certain British ship owners contracted before the war to put one of their vessels at the command of a Maryland charterer between August 5 and 25, 1914. The owners duly tendered the vessel, but the charterer refused to furnish a cargo, although it would then not have been illegal for the vessel to have made the voyage to the ports designated in the charter. It was held that the ship owners might recover damages for the breach of this

[44]See Cox *v.* United States (1832) 31 U. S. 172.

[45]Reid *v.* Alaska Packing Co. (1903) 43 Ore. 429, 73 Pac. 337; Rowe *v.* Peabody (1911) 207 Mass. 226, 93 N. E. 604.

[46](D. C. 1916) 232 Fed. 186.

contract. In *Ducas Co.* v. *Bayer Co.*,[47] the defendant, an American agent of a German chemical house, contracted before the war to sell to the plaintiff, an American firm, 75 barrels of German dyes to be imported from Germany. The war made it impossible to obtain the supply contracted for, yet the defendant was unable to prove an embargo on dyestuffs by Germany at the time fixed for performance. The New York court held that the plaintiff might recover.[48]

But hardship in certain cases seems to have procured a relaxation of the rule that impossibility of performance never excuses non-performance. The strict rule of the early common law that impossibility was never an excuse,[49] has given way, and exceptional cases, in which impossibility is accepted as a defense, are now generally collected under three broad heads:[50] (1) impossibility created by domestic law,[51] (2) impossibility created by the destruction of the subject matter of the contract,[52] and (3) impossibility created by the sickness, insanity or death of a party to a contract for personal service.[53] If follows, therefore, that when war makes performance of an executory contract impossible, though not unlawful, and such impossibility is of one of these classes, performance will be excused. Thus in *Alfred Marks Realty Co.* v. *"Churchills"*[54] the defendant contracted with the plaintiff before the war that defendant's advertisement should be

[47](Sup. Ct. 1916) 163 N. Y. Supp. 32.

[48]To the same effect see, Davis Co. *v.* Hoffman-LaRoche Chemical Works (1917) 178 App. Div. 850, 166 N. Y. Supp. 179; Gaves *v.* Miami S. S. Co. (1899) 29 Misc. 645, 61 N. Y. Supp. 115.

[49]Year Book, 22 Edw. IV, pl. 26; Paradine *v.* Jane, Aleyn, 27.

[50]Anson on Contracts (11th Am. ed.) § 412 *et seq.*

[51]Baily *v.* DeCrespigny (1869) L. R. 4 Q. B. 180; *In re* Shipton, Anderson & Co. [1915] 3 K. B. 676. Impossibility created by foreign law is generally said to afford no excuse for non-performance. Barker *v.* Hodgson (1814) 3 M. & S. 267; Ashmore & Son *v.* Cox & Co. [1899] 1 Q. B. 436; Tweedie Trading Co. *v.* McDonald Co. (D. C. 1902) 114 Fed. 985; Jacobs *v.* Credit Lyonnais, *supra,* footnote 40; Spence *v.* Chodwick (1847) 10 Q. B. 517; Medeiros *v.* Hill (1832) 8 Bing. 231.

[52]Clarksville Land Co. *v.* Harriman (1895) 68 N. H. 374, 44 Atl. 527; Mineral Park Land Co. *v.* Howard (1916) 172 Cal. 289, 156 Pac. 458; Lorillard *v.* Clyde (1894) 142 N. Y. 456, 37 N. E. 489.

[53]Robinson *v.* Davison (1871) L. R. 6 Ex. 269; Spalding *v.* Rosa (1877) 71 N. Y. 40. In these exceptional cases performance is excused on one of two theories: (1) that it was an implied term of the contract that the promisor was not to be bound upon the happening of the contingency making performance impossible; or (2) that conditions have so changed between the time of contracting and the time for performance that it would be inequitable to compel performance. See 19 Harvard Law Rev. 462.

[54](1915) 90 Misc. 370, 153 N. Y. Supp. 264.

inserted at a certain price in a "Souvenir and Program of International Yacht Races" which the plaintiff was compiling. The international yacht races were subsequently abandoned on account of the war. The plaintiff, however, proceeded to publish and offer for sale the souvenir program, with defendant's advertisement therein, and sued defendant for failure to pay for the advertisement. The plaintiff was denied recovery on the ground that "where the performance of an agreement depends upon the happening of an event over which neither party has any control, an implied condition will be read into the agreement to the effect that the contract shall be abrogated upon the nonhappening of such an event."[55] In this case performance, though not made unlawful by the war, seems to have been regarded as impossible by reason of the destruction of the subject-matter of the contract, and was therefore excused.

But more frequently the performance of the contracts herein considered, aside from all question of impossibility, will become, upon the outbreak of war, actually illegal by the law of the jurisdiction whose law the court adopts in deciding the case. As has already been said, the courts have generally assumed, doubtless in the absence of citation of foreign law by counsel, that the law of the forum governs. This being the case, it has frequently been held, that if such law renders further performance of the contract unlawful, such further performance is excused, the contract being forthwith declared illegal and at an end. The leading case in illustration of this is *Esposito* v. *Bowden*,[56] decided in 1857, and frequently cited. The plaintiff, an Italian shipowner, contracted with the defendant, a British merchant, that his vessel should proceed from a British port to Odessa, there to load with a cargo of specified goods from the defendant's factors and convey the same to Falmouth. Before the vessel arrived at Odessa, England had declared war on Russia, and in consequence no cargo was loaded. It was held that this non-performance by the defendant was excused, since it appeared that the defendant could not have loaded the vessel without trading with the enemy, which was of course unlawful. The contract was accordingly said to be "dissolved." Two recent English cases, arising out of situations created by the present war, are also illustrative of the same rule. In *Arnhold Karberg & Co.* v. *Blythe, etc., Co.*,[57] decided in 1915, the

[55] At p. 371.
[56] *Supra*, footnote 12.
[57] *Supra*, footnote 5.

contract involved was between two English merchants, the one agreeing to sell and the other to buy beans, shipped from certain Chinese ports to Naples and Rotterdam, payment to be made in London upon presentation of the bills of lading. The seller shipped the goods in July, 1914, on German vessels and took German bills of lading. Upon the outbreak of war these German vessels put into ports of refuge in the East. The seller tendered the bills of lading to the buyer in London, but the buyer refused to accept the same or pay for the beans, and the seller brought suit. The Court of Appeal held that the non-performance of the buyer was excused; that the bills of lading tendered by the seller represented executory contracts between German shipmasters and the English shipper, performance of which had become unlawful; that such contracts were therefore void and the buyer was not obliged to accept the same as a due discharge of the seller's obligations. In *Zinc Corporation, Ltd.* v. *Hirsch*,[58] a British corporation, had contracted, in 1908 and 1910, to sell to German merchants the whole of its production of zinc concentrates from its Australian mines. By this contract the British corporation was prohibited during the life of the contract from selling any zinc concentrates to any other parties, and it was also provided that upon the occurrence of strikes, floods, acts of God, *etc.* preventing or delaying the carrying out of the contract, the contract should be suspended during the continuance of such disability. After the outbreak of the present war the British corporation brought action to have the contract declared dissolved. The court argued that, granted that war was one of the contingencies during the continuance of which the contract provided for a suspension of deliveries, nevertheless it would be unlawful to allow the rest of the contract to stand, even though no deliveries were made, since to do so would require a certain amount of commercial intercourse with the enemy, and, by reason of the clause in the contract prohibiting sales to other parties, would be of benefit to the enemy's trade during the war, and would prevent the corporation from using its resources for the benefit of England. Thus it will be seen that every executory contract, the performance of which may be declared illegal or contrary to public policy, becomes thereafter unenforceable.[59] As nearly every executory contract involves a certain amount of

[58] [1916] 1 K. B. 541.

[59] But if performance is declared illegal by foreign law, *i. e.* law different from the law applied by the court which tries the case, non-performance will not be excused. *Cf. supra,* footnote 51.

commercial intercourse between the contracting parties, and as intercourse between residents in warring countries is illegal, the broad rule, so frequently announced, that executory contracts between residents in the belligerent countries are extinguished upon the outbreak of war,[60] is approximately correct.[61]

No decision has been found which goes farther in excusing nonperformance occasioned by war than that of the Supreme Court of the United States in the recent case of *North German Lloyd* v. *Guaranty Trust Co.*[62] The Kronprinzessin Cecilie, owned by a German corporation, sailed from New York for Bremerhaven *via* Plymouth and Cherbourg on July 28, 1914, having on board a quantity of gold, which the owners of the vessel had contracted to transport to the latter ports. When distant 1070 nautical miles from Plymouth, the master of the vessel, knowing that war had been declared by Austria against Servia, that Germany had declined a proposal for a conference of Ambassadors at London, that orders had been issued for the German fleet to concentrate in home waters, that British battle squadrons were ready for service, that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London stock exchange; and knowing, also, that he had proceeded as far as he could and still have coal enough to return to New York, put back to America. War between Germany, and France and England had not in fact been declared when the vessel thus turned back, and if nothing unforeseen had happened the vessel might have delivered the gold and escaped capture by the margin of a few hours. Libels, alleging breach of this contract, were filed against the vessel. The Supreme

[60]Hanger *v.* Abbott, *supra,* footnote 3; M'Grath & Jones *v.* Isaacs, *supra,* footnote 3; Brown *v.* Delano, *supra,* footnote 3.

[61]Since, however, contracts may infrequently arise which, though executory, involve no possibility of trading with the enemy, the principle of the rule should be kept in mind, rather than any strict maxim applicable alike to all cases. Buchanan *v.* Curry, *supra,* footnote 4. See also Statham *v.* New York Life Ins. Co., *supra,* footnote 2, at p. 598, where it is said: "If an *ante bellum* contract is dissolved at all, it is because its performance is inconsistent with the duties and allegiance which the parties owe to their respective countries, and involves some violation or infringement of these, and which has not been performed in whole or part by either party. The annihilation of such a contract would not be injurious to either party, but would rather dissolve their inconvenient relations. * * * If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, then no principle of law or policy, arising out of a state of war between their respective countries, would demand an abrogation of the contract, or its non-performance."

[62]61 Law Ed. 490. Same case, The Kronprinzessin Cecilie (1917) 244 U. S. 12, 37 Sup. Ct. 490.

Court, Mr. Justice Pitney and Mr. Justice Clarke dissenting, reversing the decree of the circuit court of appeals, held that the libels should be dismissed. The opinion is written by Mr. Justice Holmes and proceeds upon the theory that it was an implied term of the contract that the anticipated prohibitions and dangers attendant upon performance should excuse non-performance. In some of the cases cited in the opinion impossibility was held to constitute a defense, but it is believed that neither anticipated impossibility nor anticipated illegality influenced the decision so much as the consideration of the grave risk to the valuable vessel and cargo and to the passengers, should the voyage have been continued.[63]

In addition to what has been said it should be noted that certain provisions of the recent Trading with the Enemy Act permit a cancellation of contracts entered into before the war with those who are now our enemies. Thus section 4a provides that insurance companies organized within the United States may abrogate contracts entered into prior to the beginning of the war with enemy or ally of enemy insurance or reinsurance companies, by serving 30 days' written notice upon the President of election to do so. And by section 8b it is provided that "Any contract entered into prior to the beginning of the war between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery, during or after any war in which a present enemy or ally of enemy nation has been or is now engaged, of anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the alien property custodian of his or its election to abrogate such contract." By taking the course prescribed by these sections, certain American obligors are enabled to absolve themselves from all liability for future non-performance of certain specified types of contracts, so far as American law is applicable and capable of excusing such non-performance.

But while non-performance of one of the parties to a contract may thus be excused because performance would be illegal, or impossible for reasons recognized by the law of contracts as constituting an excuse, performance by the other contracting party may be neither illegal nor impossible. Yet the cases frequently

[63] *Cf.* Atkinson *v.* Ritchie (1809) 10 East 530 which arrived at a different result on similar facts.

speak of the contract as being "dissolved" and certain it is that when one party is declared to be absolved from liability to perform, the other party is generally discharged from future performance. Suppose, for instance, that prior to August, 1914, an American citizen had entered into a contract with an Austrian corporation, by the terms of which the American assigned to the Austrian corporation certain patent rights, and agreed to assign others as they should be perfected, the same to be exploited by the Austrian corporation in Russia, and the American to receive royalties from such exploitation. Upon the outbreak of war between Austria and Russia, and before the United States entered the conflict, what would be the rights of the parties to this contract? Here, again, it is believed that well defined principles of the law of contracts would solve the difficulty. Performance by the American party to this contract would be neither impossible nor unlawful, the American being a neutral. Performance by the Austrian corporation would, however, be at least unlawful, as involving commercial intercourse with Russia. In consequence, the Austrian corporation would cease to perform. The contract contemplated, however, that the consideration flowing to the American would be the immediate introduction and exploitation of his patent rights in Russia. In other words, the prompt performance by the Austrian corporation of its obligations would be an implied condition precedent to any obligation upon the part of the American to assign future patent rights or otherwise perform his obligations under the contract.[64] Such implied condition precedent not having been performed, the American would be excused from further performance on his part or any future liability. The breach of the Austrian corporation would go to the essence of the contract,[65] and the American might lawfully treat the contract as at an end.[66]

[64]See Costigan, Performance of Contracts (Pamphlet ed. 1911) p. 46 *et seq.*

[65]Chitty on Contracts (16th ed.) p. 771, where it is said, "The general question in such cases is whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff, a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects the performance of the original contract, and may be compensated for in damages. In the former case, the stipulation will be taken to have been intended to be a condition precedent; in the latter it will not."

[66]Loudenback Fertilizer Co. *v.* Tennessee Phosphate Co. (C. C. A. 1903) 121 Fed. 298; Missouri Pac. Ry. *v.* Yarnell (1898) 65 Ark. 320, 46 S. W. 943; Alachua Phosphate Co. *v.* Anglo-Continental Guano Works (1906) 51 Fla. 143, 40 So. 74; Willington *v.* West Boylston (1826) 21 Mass. 101; Pollock, Contracts (3rd ed.) 427.

A leading case which admirably illustrates this principle is *New York Life Insurance Co.* v. *Statham*,[67] decided by the Supreme Court of the United States in 1876. The life of X, a resident of Mississippi, was insured by a New York corporation prior to the Civil War. Premiums were paid regularly until the outbreak of the Civil War, and then by reason of the interruption of commercial intercourse, they were not paid for several years. After the war and the death of X, suit was brought on this policy. It was held that there could be no recovery, on the ground that the prompt payment of premium was a condition precedent to liability on the policy; that a failure to pay premiums was a breach going to the essence of the contract, which excused the insurance company from further performance, and it made no difference that the failure to pay premiums was due to the war. Mr. Justice Bradley says,[68]

> "the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?
>
> "The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

[67] *Supra*, footnote 18. *Accord:* Abell *v.* Pennsylvania Mut. Life Ins. Co. (1881) 18 W. Va. 400; O'Reily *v.* Mutual Life Ins. Co., *supra*, footnote 2; *contra*, Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra*, footnote 4.

[68] At pp. 31-32.

Upon this reasoning it makes no difference whether or not the non-performance of the contracting party in default is excused, for the very fact of non-performance, if it deprives the other contracting party of the consideration for which he bargained, will excuse performance by the other party to the contract.

This reasoning, also, serves to classify a type of case generally regarded as an exception to the rule usually announced regarding executory contracts.[69] Where war has not been declared, but an embargo has been laid, it is generally said that a contract, the performance of which is prevented by such embargo, is not "dissolved" but merely "suspended." This means nothing more than this: where the performance of A is prevented by an embargo, non-performance by A is excused during the continuance of the embargo. But since the embargo is regarded as a temporary expedient, likely at any moment to be lifted, B, the other party to the contract, is not ordinarily permitted to treat such non-performance by A as a breach going to the essence of the contract, at least until a reasonable time has elapsed without the embargo being raised. In this sense the contract is "suspended" for a reasonable time. If the embargo is raised within a brief period, A and B must both resume performance of the contract.

The preceding paragraphs have by no means exhausted the possibilities of the subject discussed. They will have served their purpose, if they have suggested to the reader: first, that well settled principles of the law of contracts are as applicable to contracts affected by war, as to contracts made and performed in time of peace; and secondly, the specific application of such principles to situations which frequently arise by reason of war. The confused language, the frequent use of catch phrases in place of reasoning, and the absence of argument upon general principles of contract law, to be found in the decisions upon this subject—all tending to perplex the student and practitioner—must be the excuse for this necessarily limited attempt at general classification and definition. The results reached, aside from the effect of particular statutes, may be briefly summarized as follows: Contracts between residents in opposing belligerent countries made after the outbreak of war are void as against public policy, if by any possibility communication or intercourse with the enemy

[69] Millar & Co. Ltd. *v.* Taylor & Co. Ltd. [1916] 1 K. B. 402; Palmer *v.* Lorillard (N. Y. 1819) 16 Johns. *348; Odlin *v.* Insurance Co. of Pa. (1808) 18 Fed. Cas. No. 10,433; Ogden *v.* Barker (N. Y. 1820) 18 Johns. *87; Baylies *v.* Fettyplace (1811) 7 Mass. *325.

country will result therefrom. Debts owing to residents in an enemy country are not extinguished by the war, but the creditor may not enforce payment while war lasts. The creditor is protected against the running of the statute of limitations, but is not allowed to recover interest during the period of the war, even though the debt matures during such period. The performance of executory contracts is often rendered impossible and in certain exceptional cases, recognized by the common law, non-performance of such contracts will be excused on the ground of impossibility. The performance of executory contracts also very frequently becomes unlawful, whereupon non-performance will be excused on the ground of public policy. Where one party to an executory contract fails in performance by reason of the war, if such failure goes to the essence of the contract, the other contracting party will be excused from further liability and the contract will be at an end. Finally, the applicability of these rules to a given controversy should be governed by the principles of the conflict of laws.

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